

97TH CONGRESS } HOUSE OF REPRESENTATIVES { REPT. 97-71
1st Session } Part 2

LEGISLATIVE COUNSEL
FILE COPY

**DEPARTMENT OF DEFENSE AUTHORIZATION
ACT, 1982**

JUNE 12, 1981.—Ordered to be printed

Mr. HUGHES, from the Committee on the Judiciary,
submitted the following

R E P O R T

together with

SEPARATE AND DISSENTING VIEWS

[To accompany H.R. 3519]

[Including cost estimate of the Congressional Budget Office]

The Committee on the Judiciary, to whom was referred the bill (H.R. 3519) to authorize appropriations for fiscal year 1982 for the Armed Forces for procurement, for research, development, test, and evaluation, and for operation and maintenance, to prescribe personnel strengths for such fiscal year for the Armed Forces and for civilian employees of the Department of Defense, to authorize appropriations for such fiscal year for civil defense, and for other purposes, having considered the same, report favorably thereon with an amendment and recommend that the bill as amended do pass.

The amendment (stated in terms of the page and line numbers of the introduced bill) is as follows:

Page 42, strike out line 20 and all that follows through line 24 on page 44 and insert in lieu thereof the following:

**CHAPTER 18—MILITARY COOPERATION WITH
CIVILIAN LAW ENFORCEMENT OFFICIALS**

- Sec.
371. Use of information obtained by members of the Army, Navy, Air Force, and Marine Corps.
372. Use of Army, Navy, Air Force, and Marine Corps equipment and facilities.
373. Training and advising civilian law enforcement officials.
374. Regulations.
375. Military personnel assistance.

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§ 371. Use of information obtained by members of the Army, Navy, Air Force, and Marine Corps

The Secretary of Defense may, in accordance with other applicable law, provide to Federal, State, or local law enforcement officials any information collected during the normal course of military operations that may be relevant to a violation of any Federal or State law within the jurisdiction of such officials.

§ 372. Use of Army, Navy, Air Force, and Marine Corps equipment and facilities

The Secretary of Defense may, in accordance with other applicable law, make available any equipment, base facility, or research facility of the Army, Navy, Air Force, or Marine Corps to any Federal, State, or local civilian law enforcement official for law enforcement purposes.

§ 373. Training and advising civilian law enforcement officials

The Secretary of Defense may assign members of the Army, Navy, Air Force, and Marine Corps to train Federal, State, and local civilian law enforcement officials in the operation and maintenance of equipment made available under section 372 of this title and to provide expert advice relevant to the purposes of this chapter.

§ 374. Regulations

(a) The Secretary of Defense shall issue such regulations as may be necessary to assure that the provision of any assistance, or the provision of any equipment or facility, to any law enforcement official under this chapter does not—

(1) adversely affect the military preparedness of the United States; or

(2) include or permit direct participation by any member of the Army, Navy, Air Force, or Marine Corps in any search and seizure, arrest, or other similar activity unless participation in such activity by such member is otherwise authorized by law.

(b) The Secretary of Defense shall issue regulations providing that reimbursement may be a condition of assistance to any law enforcement official under this chapter.

§ 375. Military personnel assistance

The Secretary of Defense, upon request from the head of a Federal agency with jurisdiction to enforce the Controlled Substances Act or the Controlled Substances Import and Export Act, may assign members of the Army, Navy, Air Force, or Marine Corps to operate and maintain or assist such agency's law enforcement officials in operating and maintaining equipment made available under section 372 of this title with respect to any violation of the Controlled Substances Act or the Controlled Substances Import and Export Act.

BACKGROUND

The rising tide of drugs being smuggled into the United States by land, sea, and air presents a grave threat to all Americans. Law enforcement officials estimate that they are able to interdict only about 15 percent of the incoming illicit drugs. The menace posed to our society by this activity is substantial. Only through the dedicated work of all of Federal, State, and local law enforcement agencies can we begin to stem this tide. In fighting this battle, it is important to maximize the degree of cooperation between the military and civilian law enforcement. At the same time, we must recognize the need to maintain the traditional balance of authority between civilians and the military.

This legislation will provide material assistance to law enforcement by setting forth clear legal principles regarding effective cooperation between the military and civilian law enforcement agencies. Currently, the defense establishment provides information, equipment, and training to civilian authorities. This legislation will ensure that these practices continue.

More importantly, however, it takes two additional steps toward improving present levels of cooperation.

The Posse Comitatus Act, 18 U.S.C. 1385, is sufficiently ambiguous to cause some commanders to deny aid, even when such assistance would in fact be legally proper. This reluctance to act should be cured by this legislative clarification of Congressional intent. The second improvement made by the bill is in proposed section 375 which fills a gap in existing law by permitting military personnel to operate and maintain equipment which has been lent to civilian drug enforcement agencies.

The current relationship between the military forces and civilian law enforcement authorities is controlled by the Posse Comitatus Act, 18 U.S.C. 1385. Section 908 of the Department of Defense authorization bill clarifies that Act. H.R. 3915, in which section 908 is contained, was originally reported by the Committee on Armed Services. The Committee on the Judiciary received a sequential referral of section 908, and on June 3, 1981, the Subcommittee on Crime of that Committee held hearings on the language in the section as proposed by the Armed Services Committee. The Subcommittee received testimony from (1) William H. Taft IV, General Counsel, United States Department of Defense; (2) Edward S. G. Dennis, Jr., Section Chief, Narcotics and Dangerous Drugs Section, Criminal Division, United States Department of Justice; (3) George C. Corcoran, Jr., Assistant Commissioner (Border Operations), United States Customs Service, United States Department of Treasury; (4) Rear Admiral Donald C. Thompson, Chief of Operations, United States Coast Guard, United States Department of Transportation; (5) Professor Christopher Pyle, Mount Holyoke College; and (6) our distinguished Congressional colleague, Charles E. Bennett of Florida. In addition to receiving oral testimony, the Committee received extensive written statements from all of the witnesses.

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The Committee benefitted immensely from the insights obtained at the aforementioned hearings. More importantly, the Committee owes a debt of gratitude to the work previously done in this area by our Congressional colleagues in the Armed Services Committee and on the Select Committee on Narcotics Abuse and Control, as well as in the Senate Permanent Subcommittee on Investigations of the Committee on Governmental Affairs. Each of these bodies has held hearings or discussions concerning the need to improve the level of cooperation between the military and civilian authorities. Without the work of colleagues like Representatives Charles Bennett of Florida, Billy Lee Evans of Georgia, and Senator Sam Nunn of Georgia, there would have been less impetus for responding to the tremendous problems facing law enforcement in coping with smuggling and trafficking of drugs.

The Report which follows is divided into two sections. The first section is a discussion of the current law of Posse Comitatus. The second section is a discussion of the provisions of the bill as reported by the Committee on the Judiciary.

CURRENT LAW

Posse comitatus (literally "power of the country") was defined at common law as all those over the age of 15 upon whom a sheriff could call for assistance in preventing any type of civil disorder. 1 W. Blackstone, *Commentaries* 343-44. The Posse Comitatus Act (18 U.S.C. 1385)¹ makes it a felony "except in cases and under circumstances expressly authorized by the Constitution or Act of Congress [to] use any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws."

As originally proposed, the Act would have applied to all of the armed services. See 7 Cong. Rec. 3586 (1878) (remarks of Rep. Kimmel). The final versions of the Act, however, mentioned only the Army, because the Act was a rider to any Army appropriations bill. Furman, *Restrictions Upon Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 98 (1960). The reference to the Air Force was added in 1956 to take into account the creation of a Department of the Air Force separate from the Army. *Id.* at 96. See Note, *Honored in the Breach: Presidential Authority to Execute the Laws with Military Force*, 83 YALE L.J. 130, 141 (1973); Note, *The Posse Comitatus Act: Reconstruction Politics Reconsidered*, 13 AM. CRIM. L. REV. 703, 713 (1976) (hereinafter cited as *Reconstruction Politics Reconsidered*). Even though they were not legally bound by the strictures of the Act, Navy Department regulations accepted its wisdom and directed Navy and Marine Corps personnel to comply with it. Secretary of Navy Instruction 5820.7 (May 15, 1974). See *United States v. Walden*, 490 F.2d 372 (4th Cir.), cert. denied, 416 U.S. 983 (1974). The peace time Coast Guard is not covered by the Act. See *Jackson v. State*, 575 P.2d 87 (Alaska, 1977). Under the provisions 19 U.S.C. 1401 and 14 U.S.C. 143, Coast Guard officers are deemed to be officers of the United States Customs Service and thus are au-

¹ 18 U.S.C. 1385. Use of Army and Air Force as posse comitatus. Whoever, except in cases and under circumstances expressly authorized by the Constitution or Act of Congress, willfully uses any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws shall be fined not more than \$10,000 or imprisoned not more than two years, or both.

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thorizes the Coast Guard to obtain the assistance of the Department
of Defense in enforcing the Fishery and Conservation Management
Act of 1976).

According to a spokesperson for the Department of Justice, no one
has been charged or prosecuted under the Posse Comitatus Act since
its enactment. Testimony of Edward S. G. Dennis, Jr. on behalf of
the Department of Justice, Hearings on H.R. 3519 before the Subcom-
mittee on Crime, House Committee on the Judiciary, 97th Cong., 1st
sess. (1981) (hereinafter cited as *Hearings*). See also *Reconstruction*
Politics Reconsidered, Supra, at 716-17. Through judicial interpreta-
tion, the Act appears to have been limited primarily to three types of
challenges in criminal cases.² The first type involves a challenge to the
courts' jurisdiction. See *Reconstruction Politics Reconsidered, supra*,
at 717-18; *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948),
cert. denied, 336 U.S. 918 (1949) (Army's arrest of United States
national in Germany and transportation of that national to trial).

The second type of case involves an attempt to exclude evidence on
the theory that the government's evidence has been tainted by a viola-
tion of the Act and is therefore inadmissible. See *Reconstruction Poli-*
tics Reconsidered, supra, at 719-23, *Hildebrand v. State*, 507 P.2d 1323
(Okla. Crim. App. 1973); *Hubert v. State*, 504 P.2d 1245 (Okla. Crim.
App. 1972). Those attempts have been unsuccessful; the courts have
avoided ruling on the question of excluding the evidence by finding no
violation of the Act. Other courts that have addressed this question
have found violations of the Act, but have declined to apply the ex-
clusionary rule without evidence of systematic violations. See *United*
States v. Wolffs, 594 F.2d 77, 85 (1979); *United States v. Walden*, 490
F.2d 372, 376-377 (4th Cir. 1974), *cert. denied*, 416 U.S. 983 (1974).
(Violation of a Navy regulation adopted Posse Comitatus principles
and applying them to the Navy not sufficiently systematic.)

The third type of case involves a challenge to an indictment. The
aftermath of the occupation of Wounded Knee resulted in three sig-
nificant discussions of the Act—in *United States v. Banks*, 383 F.Supp.
368 (D.S.D. 1974), *United States v. Jaramillo*, 380 F.Supp. 1375 (D.
Neb. 1974), *appeal denied*, 510 F.2d 808 (8th Cir. 1975), and *United*
States v. Red Feather, 392 F.Supp. 916 (D.S.D. 1975), *aff'd sub nom.*
United States v. Caspar, 541 F.2d 1275 (8th Cir. 1976), *cert. denied*,
430 U.S. 970 (1977) (Where the court affirmed the lower court's factual
findings without accepting its legal theory). Although the military
activities challenged in each case were identical, the courts in *Banks*
and *Jaramillo* found those activities to be in violation of the Act,
while the lower court in *Red Feather* found those activities to be
permissible.

The *Banks* and *Jaramillo* courts, in finding that the civilian officials
did employ part of the Army and Air Force to enforce the law, con-
cluded that there was insufficient evidence of the lawfulness of the
Government conduct to justify submitting to the jury those counts
alleging that the defendants violated 18 U.S.C. 231(a)(3), which pro-
hibits interfering with a law enforcement officer in the *lawful* perform-
ance of duties incident to a civil disorder. Despite the rebuttable pre-

² One reported civil case related to a Federal Tort Claims Act action. *Wrynn v. United*
States, 200 F. Supp. 457 (E.D.N.Y. 1961)

sumption that law enforcement officials are lawfully engaged, the *Banks* court dismissed the charges, finding that "the posse comitatus matter was, and is, inextricably intertwined in the question of sufficiency of the evidence." *United States v. Banks*, 383 F.Supp. 368,376 (D.S.D. 1974). It based its decision, in part, on the participation of the military in repairing the armored personnel carriers which were lent to the civilian authorities.

Faced with identical facts, the *Jaramillo* court found "that the furnishings . . . materiels, standing alone, is [*sic*] not a violation of 18 U.S.C. 1385" and concluded that "it is the use of military personnel, not materiel, which is proscribed by 18 U.S.C. 1385." *United States v. Jaramillo*, 380 F.Supp. 1375, 1376 (D.Neb. 1974). The court made no finding as to whether the military presence was essential to the success of the civilian authorities' course of action. These two cases serve to illustrate the confusion regarding the Act and the problems that result when it is too mechanically applied.

The court in *Red Feather* partially granted the United States' *in limine* to bar the defendants from introducing evidence concerning certain law enforcement use of military equipment or of the military's passive role in the Wounded Knee occupation. The court stated that the Act was designed to prevent the "direct active use of Army or Air Force personnel and does not mean the use of Army or Air Force equipment or materiel", 392 F.Supp. 921. It concluded that

Congress did not intend to make unlawful the involvement of Federal troops in a passive role in civilian law enforcement activities. [Passive roles include] . . . the mere presence of military personnel under orders to report the necessity for military intervention, preparation of contingency plans to be used if military intervention is ordered; advice or recommendations given to civilian law enforcement officers by military personnel on tactics or logistics; presence of military personnel to deliver military materiel, equipment or supplies, to train local law enforcement officials on the proper use and care of such materiel or equipment and to maintain such materiel or equipment; aerial photographic reconnaissance flights and other like activities. *United States v. Red Feather*, 392 F.Supp. 916, 921, 924, 925 (D.S.D. 1975) *aff'd sub nom. United States v. Caspar*, 541 F.2d 1275 (8th Cir. *cert. denied*, 430 U.S. 970(1977).

Certain military activities, although otherwise prohibited by the Posse Comitatus Act, are permissible if expressly authorized by statute.⁹ These permissible military actions are specifically defined and are generally restricted to instances involving civil disorders (10 U.S.C. 331-36), disasters (42 U.S. 4401-84 and 1855), and threats to Federal property (see letter from Mary C. Lawton, Office of Legal Counsel, Department of Justice, to Deanne Siemer, General Counsel, Department of Defense, March 24, 1978, at 3; see also *United States v. Banks*, 539 F.2d 14, 16 (4th Cir. 1976). The other specific and "express" statutory exceptions to Posse Comitatus include: (1) 16 U.S.C. 23

⁹ The statute permits Constitutional exceptions. However, there are none.

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and 16 U.S.C. 78 (protection of Federal parks); (2) 18 U.S.C. 112(f) and 1116 (protection of foreign officials, official guests, and other internationally protected persons); (3) 18 U.S.C. 351 (crimes against members of Congress); (4) 18 U.S.C. 1751 and 3056 (protection against crimes against the President); (5) 22 U.S.C. 408, and 461-462 (enforcement of the neutrality laws); (6) 42 U.S.C. 1989 (execution of warrants relating to certain violations of the civil rights laws); (7) 42 U.S.C. 3756 (loan of services, equipment, personnel and facilities to LEAA); (8) 43 U.S.C. 1065 (removal of unlawful enclosures from public lands); and (9) 50 U.S.C. 220 (enforcement of the customs laws).⁴

Some courts have suggested that the Posse Comitatus Act has no extraterritorial application, although the cases upon which that conclusion rests involve special circumstances. *Chandler v. United States*, 171 F.2d 921 (1st Cir. 1948), *Gillars v. United States*, 182 F.2d 962 (D.C. Cir. 1950), and *D'Aquino v. United States*, 192 F.2d 338 (9th Cir. 1952) all involved the use of military forces overseas during the military occupation of a foreign country. In *United States v. Cotten*, 471 F.2d 744 (9th Cir. 1973), the court rejected a challenge to the court's jurisdiction by applying *Ker v. Illinois*, 119 U.S. 436 (1886), and *Frisbie v. Collins*, 342 U.S. 519 (1952). Thus, it is not possible to definitely conclude whether the Act has extraterritorial application. See generally, Siemer & Efron, *Military Participation in United States Law Enforcement Activities Overseas: The Extraterritorial Effect of the Posse Comitatus Act*, 54 ST. JOHN'S L. REV. 1 (1979); see also § 1771 of H.R. 6915, (the proposed Federal criminal code, introduced in the 96th Congress), which takes the view that the recodified provisions of the Act do not apply extraterritorially).

REPORT ON H.R. 3519, SECTION 908

PROVISIONS OF THE BILL

Overview.—Section 908 of H.R. 3519 is divided into five separate sections. The first four sections clarify existing practices of cooperation between the military and civilian law enforcement authorities. Current interpretation of the Posse Comitatus Act already permits all of the activity addressed by these four sections. However, some court interpretations of the Act are ambiguous, and because the Act was enacted so long ago, there is some potential for misinterpretation of it. The Committee therefore concluded that existing practice should be codified to eliminate any risk of error. The final section of the bill, proposed section 375, represents a slight and narrow departure from the principles of the Posse Comitatus Act insofar as it authorizes the occasional use of military personnel to operate sophisticated equipment on loan to civilian drug law enforcement agencies for specific law enforcement operations.

⁴ Current law makes some narrow exceptions to the Act when the military actions taken are incidental to a "military purpose". For example, if Army investigators, in the normal course of military activities, detect drug trafficking on a base, and that trafficking involves both military and civilian personnel, the military may share the investigative data with civilians. Meeks, *Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 104-105 (1975); Furman, *Restrictions Upon the Use of the Army Imposed by the Posse Comitatus Act*, 7 MIL. L. REV. 85, 110-111 (1960).

SECTION 371

Proposed Section 371 of Title 10 authorizes the Secretary of Defense to provide information collected during the normal course of military operations to civilian law enforcement agencies. *See Meeks, Illegal Law Enforcement: Aiding Civil Authorities in Violation of the Posse Comitatus Act*, 70 MIL. L. REV. 83, 124-26 (1975) (discusses the "Military Purpose Doctrine" which permits incidental aid to civilians in law enforcement). The sharing of information contemplated by this section is of a type already in practice by the Department of Defense.¹ Nothing in this section affects the disclosure of intelligence methods, techniques or sources. *See Pub. L. No. 96-456, Classified Information Procedures Act* (1980). The phrase "in accordance with other applicable law" as used in section 371 is meant to continue the application of the Privacy Act to this type of intelligence sharing. *See* 5 U.S.C. 552a. Current law provides the Department of Defense with two primary methods of sharing intelligence information. First, under the authority of 5 U.S.C. 552(a)(7) and (b)(3) the Department has provided for "routine use" use disclosures of information. 46 Fed. Reg. 6516 (1981). Thus, when military personnel become aware of violations of civilian laws as an incidental result of other military operations, such information may be voluntarily disclosed.

Examples of this type of information sharing include situations such as investigations of military and non-military coconspirators and the observation by military personnel of illegal conduct during a routine military mission or training operation.

The Committee anticipates, however, that an increased sensitivity to the needs of civilian law enforcement officials, particularly in drug enforcement, will permit more compatible mission planning and execution. For example, the scheduling of routine training missions can easily accommodate the need for improved intelligence information concerning drug trafficking in the Caribbean. The Committee does not intend the military to engage in the routine collection of intelligence information about United States residents. Thus, the legislation creates no risk that the military will return to the abuses exposed in previous Congressional hearings. *See Hearings on Federal Data Banks, Computers and the Bill of Rights* before the Subcommittee on Constitutional Rights, Committee on the Judiciary, United States Senate, 92nd Cong., 1st sess. *See generally* J. JENSEN, *MILITARY SURVEILLANCE OF CIVILIANS IN AMERICA* (1975). In addition, nothing in this section is intended to modify in any way existing law with respect to the military's authority (or lack thereof) to collect and disseminate intelligence information about American citizens and residents here and abroad. *See, e.g.*, Executive Order 12036.

The Departments of Justice and Defense supported the Committee's position on section 371. During hearings before the Subcommittee on Crime, both agencies indicated that they viewed the proposed section 371 as a codification of existing administrative practice and nothing

¹ The Committee adopted the view of the Department of Justice that the weight of authority on the Posse Comitatus Act "prohibits the use of military personnel as informants, undercover agents, or non-custodial interrogators in a civilian criminal investigation that does not involve potential military defendants or is not intended to lead to any official action by the armed forces." Letter from Mary C. Lawton, Office of Legal Counsel, Department of Justice to Deanne Siemer, General Counsel, Department of Defense, March 29, 1978, at 2.

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authorizes the Secretary of Defense to ensure the normal course of government agencies. See Meeks, *Authorities in Violation of* 83, 124-26 (1975) (discusses that permits incidental aid to sharing of information contemplated in practice by the Department affects the disclosure of secrets. See Pub. L. No. 96-456, 980). The phrase "in accordance with section 371 is meant to refer to this type of intelligence sharing the Department of Defense provides the Department of Justice, 552(a)(7) and (b)(3) use" use disclosures of information when military personnel become as an incidental result of information may be voluntarily

sharing include situations of military coconspirators and of illegal conduct during a mission.

that an increased sensitivity of officials, particularly in drug mission planning and executive training missions can lead to intelligence information sharing. The Committee does not oppose collection of intelligence information. Thus, the legislation refers to the abuses exposed in Hearings on *Federal Data* before the Subcommittee on the Judiciary, United States by J. JENSEN, MILITARY SUR- 5). In addition, nothing in any existing law with respect (f) to collect and disseminate citizens and residents here 130.

supported the Committee's before the Subcommittee on viewed the proposed section relative practice and nothing

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more. See statements and testimony of William H. Taft IV, General Counsel, Department of Defense and Edward S. G. Dennis, Jr., on behalf of the Department of Justice, *Hearings, supra*.

In addition, the representatives both agencies expressed the opinion that there was no conflict between proposed section 371 and the Privacy Act. The Committee added the phrase "in accordance with other applicable law" at the suggestion of the Committee on Government Operations in order to guarantee that result.

SECTION 372

Section 372 as proposed by H.R. 3519 would authorize the Secretary of Defense to provide equipment, base facilities and research facilities to the civilian law enforcement community. This section also clarifies existing administrative practice. Under current practice, the Department of Defense provides equipment to other Federal agencies on an ad hoc basis. For example, in 1980 alone, the Customs Service obtained the loan of military equipment valued at least 5 million dollars.

The Committee expects by this section to encourage efficient administrative practices of the Department of Defense in processing requests for equipment loans. The Committee does not, however, intend the military to become the routine supplier of basic equipment for civilian law enforcement agencies. Under existing practices, cooperation regarding equipment loans and other dispositions generally fall into two categories. The first type of cooperation involves the disposition of older, less useful military equipment. The second type involves the occasional loan of sophisticated equipment for a short time to accomplish the objective of a particular mission. These practices will continue to be permissible under this section.

The Committee on Government Operations expressed some concern that the proposed section, as reported by the Armed Services Committee, could cause potential conflicts with the application of other property disposition statutes. Thus, at the recommendation of the Committee on Government Operations and with the support of the Department of Defense, the Committee added the phrase "in accordance with other applicable law" to clarify the continued application of the disposition procedures of the Economy Act, 31 U.S.C. 638a, and other similar provisions, See, e.g., 10 U.S.C. 2576 and 2667 (governing the disposition of certain real and personal military property.)

The Committee also added a phrase to the bill as reported by the Armed Services Committee to clarify that the equipment disposed of or lent to civilian law enforcement authorities must be used for law enforcement purposes. Thus, the Committee does not intend to change the current practice of equipment sharing. Specifically, the Committee does not intend to change current law with respect to the use of military facilities when such a loan would unnecessarily involve the military in the execution of civilian laws. See e.g., Opinion of the Judge Advocate General-Navy 1973/8056, 1 Oct. (1973) (disapproving the request of the Governor of Hawaii to use the Naval Correction Center at Pearl Harbor on a regular basis to house state-convicted persons.

accord. Op. JA GN 1974/801, 29 Jan. 1974, JABA 1953/8755, 12 Nov. 1953; JAB 093.7, 21 May 1940; and JAB 253, 15 Aug. 1929.

The terms "equipment," "base facility" and "research facility" are left undefined to continue the narrow definitions that have evolved

over time. As used in this statute, the terms are designed to have their ordinary meaning. *See e.g.*, H.R. 1806, 97th Congress, 1st sess. (definition of equipment). Nothing in this approach, however, authorizes the use of non-governmental facilities which are being used by the government under contract unless otherwise authorized by law.

SECTION 373

Section 373 as proposed by H.R. 3519 clarifies existing practice by authorizing the Secretary of Defense to provide training assistance to civilian law enforcement personnel. This section, which received the support of both the Department of the Defense and Justice, would not alter the traditional separation of the military from civilian law enforcement. Nothing in this section contemplates the creation of large scale or elaborate training programs. Neither does the authority to provide expert advice create a loophole to allow regular or direct involvement of military personnel in what are fundamentally civilian law enforcement operations.² Compare *United States v. Caspar*, 541 F.2d 1275 (8th Cir. 1975). Rather, this section anticipates the continuing need for the military to train civilians in the operation and maintenance of the equipment lent under proposed section 372.

It should also be noted that nothing in this section in any way affects the training given by civilian law enforcement authorities to the military. The Drug Enforcement Administration in particular is to be commended for its efforts in training military personnel in drug law enforcement techniques and prevention.

SECTION 374

Proposed section 374 authorizes the promulgation of regulations by the Secretary of Defense in three different areas. First, the Secretary is directed to issue regulations which will prevent the rendering of any assistance under this Chapter (*i.e.*, under proposed sections 371, 372, 373, or 375) from interfering with the military preparedness of the United States. The Committee recognizes that the fundamental and paramount goal of the military is national defense. Thus, the Secretary may not approve a request for any assistance, no matter how incidental, if it will have an adverse consequence with respect to military preparedness.

The Secretary of Defense is also required to issue regulations to ensure that any assistance under any of the sections in this Chapter does not include or permit the direct participation by any member of the Army, Navy, Air Force or Marine Corps in any search and seizure, arrest, or similar activity unless such participation is otherwise lawful. This provision reaffirms the traditionally strong American antipathy towards the use of the military in the execution of civil law. *See generally Laird v. Tatum*, 408 U.S. 1, 16-40 (Douglas, J., dissenting). As one of the sponsors of the Posse Comitatus Act put it,

[W]henver you conclude that it is right to use the Army to execute civil process . . . it is no longer a government founded upon the consent of the people; it has become a gov-

² This section would not authorize the routine use of a Green Beret training course for urban SWAT teams.

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The Committee considered and rejected, for several reasons, a provision in the bill as reported by the Armed Services Committee which would grant arrest and seizure authority to military personnel with respect to civilian drug law enforcement. First, the Committee received no support for such authority from any of the primarily affected Federal agencies: the Departments of Justice and Defense, and the United States Customs Service and Coast Guard. Second, even if the agencies had made such a request, there was no hearing record to answer the numerous questions posed by a grant of such authority. These questions ranged from the potential foreign policy implications of using troops to enforce civilian laws near American borders or on the high seas to concerns about the training requirements (and their costs) that would be necessary.

In addition, there was concern about the potential for conflict between civilian law enforcement control and the effective operation of a military unit's command structure. The Committee thus limited the deviation from *Posse Comitatus* in section 375 to drug law cases. It found that only in the area of drug law enforcement had a strong enough argument had been made to support even the passive use of military personnel to operate and maintain equipment on loan to civilians. The Committee also kept the parameters of section 375 narrow by: (1) limiting the assistance to Federal agencies; (2) requiring the request for assistance to come from the head of the agency; and (3) limiting any operation and maintenance of equipment to that made available under proposed section 372.

Most importantly, the Committee rejected the granting of arrest and seizure authority to the military because it believes that such a grant of authority would fundamentally alter the nature of the relationship between the military and civilian society. Any attempted modification in this country's long tradition of separating the military from day to day involvement in the execution and operation of the civilian laws must overcome a strong presumption against it. Any change in this tradition may affect the rights of the civilian community, and may also have a potentially negative effect on the necessary apolitical professionalism of our Armed Forces. In this situation, the case for a change was not made.

The final subsection of proposed section 374 authorizes the Secretary of Defense to issue regulations which may condition the rendering of any assistance under this Chapter upon a reimbursement to the military. According to information received from the Coast Guard, United States Customs Service, and the Department of Justice (the Federal agencies most likely to request assistance), this reimbursement provision is acceptable and should not require any immediate increase in the budgets of those agencies. The availability of this reimbursement option is not meant to serve as an excuse for the Secretary of Defense to decline to cooperate in the provision of assistance. Rather, the reimbursement option should serve instead as an informal check of the magnitude and frequency of the requests made by civilian law enforcement officials. The availability of military assistance is not intended by the Committee to be an indirect method of increasing the budget authority of the civilian law enforcement agency.

SECTION 375

Proposed section 375 represents a modest and conditional departure from the current strictures of the Posse Comitatus Act.³ The section authorizes the assignment of military personnel to operate and maintain equipment made available under section 372 of this Chapter. In light of the historical and policy considerations behind the Posse Comitatus Act, this section is to be construed narrowly. See 18 U.S.C. 1385 (exceptions to the Act must be "expressed").

Proposed section 375 is based on evidence developed in hearings before the Subcommittee on Crime. Witnesses from the affected Federal agencies testified that, upon occasion, the type of military equipment they sought was too sophisticated to make it practical from a time standpoint, or otherwise feasible, to train civilian personnel to operate it. Section 375 as proposed is designed to correct that situation.

The Committee in proposed section 375 narrowed the availability of military personnel to situations where the request for assistance is made by the head of a Federal agency charged with the enforcement of the Federal drug laws, such as the Attorney General. Such requests should ordinarily be made in writing and should indicate that the law enforcement mission for which the assistance is requested will not succeed without the presence of the military. The Committee expects that the head of the requesting agency and the Secretary of Defense will consult with the appropriate officials of the Department of State in situations that may have foreign policy implications.

The terms "operation" and "maintenance" authorized by this section, as used in this section, are limited to the generic meanings of those terms and are constrained by the limitations of section 374 with respect to seizures and arrest authority. Nothing in this section, however, changes the existing exceptions to the Posse Comitatus Act which allow military personnel to protect lives and Federal property in emergency situations when they are involved in the performance of a lawful activity. For example, under current law, and under this proposal, nothing prohibits an Air Force pilot operating military aircraft from protecting him or herself from aggressive or destructive acts of a drug violator while on an authorized mission.

OVERSIGHT FINDINGS

The Committee makes no oversight findings with respect to this legislation.

In regard to clause 2(1) (3) (D) of rule XI of the Rules of the House

³ The Committee considered and narrowly rejected a suggestion that the assistance permitted by this section be made available only outside the United States. It was concerned that such a limitation would cause problems with respect to the operation of radar or similar surveillance devices inside the United States. The Committee was also concerned about the occasional use of aircraft or vessel based in the United States, but temporarily outside the United States on missions.

The rejection of this amendment should not be viewed as an encouragement of the use of such military assistance within the United States. Rather, the Committee expects that the vast majority of the requests for assistance will be for operations that occur outside the geographic United States. A regulatory or similar limitation of the assistance authorized by section 375 would resolve the concerns of Committee members who feared the possibility that this type of assistance might be used excessively within the United States. This kind of policy limitation would also resolve most of the concerns about potential civil liability raised by the Department of Defense. The Department of Defense is, therefore, encouraged to issue regulations under section 374 to meet these concerns.

Nothing in this section in any way affects the extraterritorial application, if any, of the Posse Comitatus Act.

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